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In the Matter of:	*		
	*	Case No.:	2000-TLC-12
E & V Contract Farms	*		
Employer/Respondent	*	Dated:	June 5, 2000

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Appearances:

G.A. Cady, III, Esquire
For Employer/Respondent

Stephen R. Jones, Esquire
For U.S. Department of Labor

BEFORE: **DAVID W. DI DINARDI**
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and its implementing regulations found at 20 C.F.R. Part 655.[1] This Decision and Order is based on the written record, consisting of the Employment and Training Administration appeal file, the written submissions of the parties, the arguments of counsel and the credible testimony of witnesses at the hearing, which was held before the undersigned on May 25, 2000 in Des Moines, Iowa. 20 C.F.R. § 655.12(a)(2). The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for an exhibit offered by the Department of Labor Certifying Officer and RX for an exhibit offered by the Respondent. This decision is being rendered after having given full consideration to the entire record. E & V Contract Farms has requested expedited review of a decision by a U.S. Department of Labor Certifying Officer denying its application for temporary alien agricultural labor certification.

Statement of the Case

This case involves an application for certification of temporary alien agricultural workers under the Immigration and Nationality Act ("INA") originally filed by E & V Contract Farms ("E

[1]Unless otherwise noted, all regulations cited in this decision are in Title 20.

& V" or "Respondent" herein) on October 7, 1999. (CX 2) In that application, E & V sought 60 unnamed aliens to serve as "poultry farmworkers" from December 10, 1999 to August 31, 2000. By correspondence dated October 18, 1999, DOL notified Respondent that its application would not be accepted for consideration, stating that it did not "meet the requirements of 20 C.F.R. 655.101-103 and that "the availability of U.S. workers cannot be tested because the benefits, wage rates, and/or working conditions do not meet criteria established in the regulations. (**Id.**) This letter also contained an attachment setting forth the specific reasons for rejection of the application, which stated that Respondent "provided no documentation as to why this is a temporary position, clearly not a full-time, year-round position." (**Id.**) It further indicated that Respondent had not shown that it had exhausted all avenues of obtaining U.S. workers and "employer has not provided documentation to show that he/she has explored the possibility of obtaining U.S. workers from the Iowa prison worker release program." (**Id.**) Finally, the attachment listed the standard assurances required by 20 C.F.R. § 655.103.

Respondent then compiled the necessary documentation to bring its application into compliance with the regulations, which consisted of the following: (1) ETA Form 790, which sets forth the job specifications, housing and transportation accommodations for workers, and wages to be paid (ALJ EX 2 at 35); (2) Wage Rate and Schedule (**Id.** at 36); (3) Designation of Agent Forms (**Id.** at 37-40); (4) Attachments describing wage rate and deductions, hours, housing, location and directions to work site, Referral Instructions, transportation arrangements, and Respondent's liability insurance coverage information (**Id.** at 41-50); (5) Employer Assurances required by Section 655.103 and Supplemental Assurances under Section 653.502 (**Id.** at 51-54); copies of newspaper and radio advertisements for poultry workers run from November 3, 1999 to January 29, 2000 (ALJ EX 2 at 55-68); and (6) Correspondence from the State of Iowa Department of Corrections dated September 23, 1999, informing Respondent that "the North Central Correctional Facility doesn't have enough inmates to supply your company." (**Id.** at 69) Respondent attached all of this documentation to a new application for temporary labor certification, which it filed with DOL on February 21, 2000. (ALJ EX 2 at 33-35) In this application, Respondent again sought temporary labor certification for 60 unnamed H-2A workers to serve as "poultry farmworkers" from May 8, 2000 to February 28, 2001.[2] (**Id.**)

The Certifying Officer ("CO") reviewed this application and, by written notice, denied it on April 24, 2000.[3] (ALJ EX 2 at 3-6) This denial letter stated the DOL "has reviewed your positive recruitment plan, and find[s] that extensive measures have been taken to recruit local workers, however further clarification of a temporary need is required." (**Id.** at 3) It further stated, "{i]f you believe you will be unable to locate a U.S. worker to perform these year-round, permanent duties,

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[2]Although Respondent's application initially stated that 60 H-2A workers were needed, Respondent later revised this number, noting at the hearing that its need was for 48 workers. (Tr. at 26)

[3]Under the regulations, the determination of whether to accept an application for consideration and whether to certify the application is made by the Regional Administrator ("RA"); however, the regulations permit the RA to delegate that responsibility to a staff member. 20 C.F.R. § 655.92. Thus, in this matter, the Certifying Officer made the determination.

you may wish to file an application for permanent labor certification." (**Id.** at 4) Finally, the denial letter contained a "Checklist Enclosure For Unacceptable Applications," which set forth the specific reasons for the denial. (**Id.** at 5-6) It reiterated the definitions of "seasonal" and "temporary" and stated, "[t]he nature of the job to be performed does not seem to be temporary in nature. Please provide additional information to support the temporary nature of the job." The letter also informed Respondent of its right to file a modified application or seek expedited administrative review of the denial.

On May 5, 2000, Respondent timely requested a **de novo** hearing before an Administrative Law Judge pursuant to 20 C.F.R. § 655.104(c)(3). (ALJ EX 1) The case was then referred to the Office of Administrative Law Judges for a formal hearing and, on May 17, 2000, this Administrative Law Judge issued a Notice of Hearing and Pre-Hearing Order pursuant to 20 C.F.R. § 655.112(2)(b)(ii) and 29 C.F.R. § 18.27. (ALJ EX 3) Both parties submitted pre-hearing statements setting forth the issues, documentary evidence and witnesses to be called at the hearing.

Post-hearing briefs were timely filed on June 2, 2000 (CX 6 and RX 2) and the official hearing transcript was also filed on June 2, 2000. The record is now closed and the matter is ready for a resolution.

Hearing Testimony

The hearing took place on May 25, 2000 in Des Moines, Iowa, at which time all parties were given a full opportunity to present evidence and oral arguments. Emilio Duran, the owner and sole proprietor of E & V Contract Farms, testified that he has been in the business of raising young chickens ("pullets") as a sole proprietor, along with his partner and wife, Victoria, for four years. (TR 42) Prior to this time, he spent another four years raising pullets for another poultry producer before going into business for himself. (TR 57) The nature of E & V's business is to raise young chicks, or "pullets," as they are known in the poultry industry, and then deliver them to egg producers, who then raise the hens, harvest their eggs, and transport the birds to factories which prepare the birds for consumer consumption. (TR 48) E & V engages in this business on a permanent, year-round basis and delivers the 16-week old chicks to egg-producers every eight weeks, after which time E & V has nothing further to do with the young chicks. (TR 48, 55) E & V employs 22 to 35 permanent employees for the raising of pullets (TR 45), whose duties include the following: (1) removing the chicks from shipping cartons and placing them in brooder houses; (2) vaccinations; (3) cleaning/filling feeders; (4) inspecting poultry for signs of disease and removing dead/diseased chicks from flock; (5) trimming beaks; and (6) maintaining/repairing feeding, illumination and ventilation systems. (ALJ EX 2 at 33) Mr. Duran further testified that he has permanent contracts with various egg-producers (Southwest Egg Sales, Midwest Hatchery, and Farmegg) and his permanent employees work year-round to fulfill these contracts. (TR 92-93, 101) E & V was then contacted by three firms (Daybreak Foods, Fremont Farms of Iowa, and Centerfresh Eggs), who normally raise their own pullets on-site, but are in the process of expanding their facilities by constructing new pullet buildings and layer houses and therefore found themselves unable to house the chicks until completion of the construction. (TR 62, 95) They therefore contracted with E & V to temporarily provide this service of raising their pullets until the new facilities were ready, approximately ten months. (RX 1, TR 50-51) Each contract stipulates that E

& V will deliver 3.2 million pullets in the ten-month period for each client, with a flock of approximately 600,000 pullets being delivered to these clients in eight week cycles. (TR 51-54) These facts were not only credibly testified to by Mr. Duran, but were confirmed by Mr. Joe Fuller, Vice President of Operations for Fremont Farms of Iowa, by letter dated May 24, 2000. (RX 1) He states therein that they are in the business of raising pullets, but are temporarily unable to house them during construction of pullet buildings and layer houses, which he reasonably expects to be completed by December 31, 2000.

In order to fulfill these temporary contracts, E & V needs to hire temporary labor, as all of E & V's permanent employees are utilized for their existing, permanent contracts. Mr. Duran testified that he could complete these contracts with 48 workers, rather than the 60 originally requested in E & V's application, estimating that he would need 12 to 16 workers per contract to complete the delivery of 3.2 million chicks per client within the ten-month period. (TR 100) However, despite his diligent efforts to procure U.S. workers which included radio and newspaper ads, as well as appeals to the local prison system for inmates eligible for work-release, E & V received only two applicants, both of whom were hired. (TR 101) The record contains copies of newspaper ads which ran in the **Times-Citizen** classifieds from November 3, 1999 to January 29, 2000, as well as the copy from a radio advertisement placed by Respondent for the purpose of recruiting domestic workers, which ran from December 5 to 20, 1999. (ALJ EX 2 at 55-69) Mr. Duran testified that he could not hire permanent employees for these contracts, as he could not guarantee permanent employment to these individuals, as he anticipated that ten months represented the outside limit on the time required to fulfill these contracts, and believed he could probably finish them even sooner. (TR 50-51, 60, 101) He further testified to the time-sensitive nature of these contracts, in that if the pullets are not delivered to the egg-producers in a timely fashion, then the layer houses stand empty. (TR 61)

The temporary workers would be employees of E & V for the duration of the contracts, all work would be performed at E & V's facilities, and at the end of the contracts, the workers would return to Mexico and would not become members of E & V's permanent workforce. (TR 55-56, 101) Moreover, once these contracts are satisfied, Mr. Duran does not foresee a need to file future applications for temporary labor certification, although he did acknowledge such a possibility exists in the event of an emergency situation where a client is unable to house its own chicks during this 16-week period; he could not state that he would turn this business away, given the system available to him for the hiring of temporary labor. (TR 62, 99, 104)

When questioned about the previous application filed in October/November of 1999, Mr. Duran stated that this application pertained to the same contracts, but that he wanted to apply early because his experience with the DOL's office has been that they are slow to act on these applications, which is also why he chose expedited review rather than re-submission of a modified application when the most recent request was denied. (TR 87-88)

Mr. Raymond Moritz, the Certifying Officer who denied Respondent's application, testified that the application was denied based on the fact that Respondent had not established the seasonal or temporary nature of the work to be performed by the H-2A beneficiaries. However, Mr. Moritz candidly admitted that he based his determination that the work was not temporary on the fact that

Respondent had filed an H-2A application in 1998, which was due to expire approximately one month after Respondent filed its second application on October 7, 1999. Therefore, the CO treated Respondent's second application as merely an attempt by respondent to extend the original application beyond the one-year period allowed under the Act for temporary workers coming to the United States under H-2A work visas. (TR 108, lines 20-25) Mr. Moritz, responding to questioning from the bench, candidly admitted that he "did not review the file," but rather relied upon "staff who are more knowledgeable of all the specifics...based on the information they provided me, the [denial] was issued." (TR 117) However, he initially testified that as Certifying Officer, it is his job "to look at the facts and the contents of the application, and make decisions, and communicate, and provide whatever opportunity is necessary to get the information [which] is available or which can be submitted to make a final determination one way or the other." (TR 113) He also stated that at the time the application was denied, he did not review the temporary contracts submitted by E & V in connection with its application, but recalls that "there were contracts in the file...." (TR 121)

DISCUSSION

The parties agreed that the work for which Respondent sought temporary labor certification was not seasonal in nature as defined in the regulations, but disagreed as to whether it was "temporary" within the meaning of 20 C.F.R. § 655.100(c)(2) and 29 C.F.R. § 500.20(s)(2) This was the sole issue presented in both pre-hearing statements submitted by the parties. However, counsel for the Department of Labor ("DOL"), Employment and Training Administration, raised an additional issue for the first time at the hearing. That issue was whether Respondent is a proper party, in the first instance, to apply for temporary labor certification under the INA. (TR 15) Counsel for DOL argues that Respondent is ineligible to apply for H-2A workers because it is really a temporary labor broker and relies upon the cases of **Matter of Artee Corporation,** 18 I. & N. Dec. 366, 1982 WL 190706 (BIA Nov. 24, 1982) (CX 3) and **Sussex Engineering, Ltd. v. Montgomery,** 825 F.2d 1084 (6th Cir. 1987) (CX 4) as support for this position.

I begin by noting that counsel for DOL failed to raise this issue prior to the hearing, nor did it specifically state in its pre-hearing statement to the Court that this issue would be raised. Moreover, the CO never indicated to Respondent that it was not a proper party to file such an application and in fact accepted the application for consideration once Respondent had submitted all required supporting documentation for processing of by DOL. As a result, Respondent was deprived of adequate time to prepare a response to this issue and although the parties were allowed to submit post-hearing briefs in this regard, counsel for DOL has offered no justifiable reason for failing to introduce this issue sooner other than to say it was an "oversight."

Of particular concern to this Court is the fact that Respondent was never notified by the CO reviewing its application that it may not be the proper party to file for H-2A certification. Rather, a review of the procedural history of this application clearly shows that no such issue was ever raised and, in fact, by letter dated March 16, 2000, DOL notified Mr. Duran that his certification request "has been accepted for consideration." (ALJ EX 2 at 28) Furthermore, by letter dated April 5, 2000, DOL notified Respondent only that "further clarification of a temporary need is requested." (ALJ EX 2 at 24) This is corroborated by a Memorandum to the ETA file dated May 18, 2000 which also states that the application was denied solely on the grounds that DOL did not find the Respondent's

need to be temporary in nature. (CX 2) Yet the certifying officer admitted that once an application is filed with his office, it is his job to notify the applicant of any deficiencies and additional information required in order to accept the application for consideration, in his words, masking the process as "customer friendly" as possible. Thus, the argument that E & V was never the appropriate party to file such an application in the first place is irreconcilable with the fact that the DOL accepted the application once Respondent had submitted all the information requested in order to complete the application. If E & V were held to be not the proper party to file such an application, they should never have been required to jump through all the regulatory hoops in order to bring the application into compliance. That is especially true in H-2a applications, given the time-sensitive nature of these situations and the need for temporary workers, which often arises in emergency situations. The Co even testified to the fact that the regulations require his office to respond within seven days of receipt of an application and the whole review process is to be completed approximately thirty days prior to the date of need. (TR 114-116)

At the very least, the CO's raising of this issue at this juncture is untimely and his failure to list this as a grounds for denial of the application has prejudiced Respondent by failing to provide E & V with the opportunity to rebut this issue. To argue that his denial of the application should be affirmed on the basis of information not disclosed to Respondent prior to the denial is unfair and I find it to be in contravention of applicable regulations. I also note that in the sister regulations pertaining to the certification process for permanent alien employees found at 20 C.F.R. § 656.25, there is a requirement that the CO issue a Notice of Findings if certification is not granted. The Notice of Findings must give notice which is adequate to provide the employer an opportunity to rebut or cure the alleged defects. **Downey Orthopedic Medical Group,** 87-INA-674 (Mar. 16,1988) (**en banc**). Case law has established that to provide adequate notice, the CO need only identify the section or subsection allegedly violated and the nature of the violation, **Flemah, Inc.,** 88-INA-62 (Feb. 21,1989) (**en banc**); inform the employer of the evidence supporting the challenge, **Shaw's Crab House,** 87-INA-714(Sept. 30, 1988) (**en banc**); and provide instructions for rebutting and curing the violation, **Peter Hsieh,** 88-INA-540 (Nov. 30, 1989).

Once the CO provides specific guides, he must be careful not to mislead the employer into believing that the specific evidence requested is all that is needed to rebut the Notice of Findings and for the application for labor certification to be granted. Often it is necessary for the CO to request specific information that he has a particular interest in obtaining in light of the deficiencies of the application. However, when the CO requires more than the specific information requested to find that the deficiency has been remedied, he must clearly state this fact in the Notice of Findings to avoid any ambiguity. There is a similar requirement in the regulations pertaining to certification of temporary alien labor found at 20 C.F.R. § 655.104(c)(1) - (3), which requires, **inter alia,** that the CO "[s]tate *all* the reasons the application is not accepted for consideration, citing the relevant regulatory standards." (Emphasis added) **See** 20 C.F.R. § 655.104(c)(1). The Board of Alien Labor Certification Appeals has held in such cases that failing to apprise an employer of the information upon which a denial is based violates the regulations set forth at 20 C.F.R. § 656.25(c). In this regard, **see In the Matter of Phototake, Employer on behalf of Meir Reuven, Alien,** 87-INA-667, 1988 WL 235732 at *3 (July 20, 1988)(Bd. Alien Lab. Cert. App.)("Employer was denied the right to be apprised of the information to be used against it, and to have an opportunity to rebut it, in violation of the regulations."); **See also In the Matter of The Little Mermaid Restaurant,** 87-

INA-675, 1988 WL 235737 at *2 (March 9, 1988)(Bd. Alien Lab. Cert. App.)("the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.").

In the case **sub judice,** the CO provided an attached "checklist" which outlined the deficiencies in Respondent's application and only made reference to its need for more particularized evidence showing the temporariness of Respondent's need for these workers. No reference was made to its need for proof that Respondent was not a temporary labor agency or other documentation proving its legitimacy as an "employer" under the regulations, nor were the applicable regulatory standards defining the term "employer," found at 20 C.F.R. § 655.100(b), cited to as required. Moreover, Mr. Moritz testified that no consideration was even given to the issue of whether E & V was an eligible employer in this case, testifying that it "was not picked up, was not recognized, and was not dealt with." (TR, 131, 142)

Based on the foregoing discussion, I find and conclude that DOL's argument that E & V was not the proper party to file an H-2A application comes too late in the day and its failure to apprise Respondent of this possible grounds for denial has severely prejudiced it by informing it not once but twice of its right to file a modified application with supporting documentation relating only to the "temporariness" of its need. By doing so, it led Respondent to believe that once it had established its temporary need, the application would be approved and deprived it of the opportunity to cure this defect, if it in fact ever existed. However, for the reasons set forth below, I find that even if it could be said that DOL raised this issue in a timely manner, there is no merit to this argument and the cases relied upon by the Solicitor are inapposite to the facts of this case, as I shall now discuss.

The Solicitor relies on two cases for the proposition that E & V is a temporary labor broker and therefore its need for temporary workers is based on its clients' needs and not its own. The **Artee** case dealt with a temporary help service which hired out machinists to technically oriented firms during a time when the United States was experiencing a severe shortage of such qualified labor. 18 I. & N. Dec 366, 1982 WL 190706 (BIA Nov. 24, 1982). In resolving the issue of whether the petitioner was eligible to apply for temporary labor certification, the Board of Immigration Appeals ("BIA") focused on the meaning of the word "temporary" as interpreted by the Immigration and Naturalization Service (INS). The INS' construction of the word "temporary" is the nature of the need of the petitioner seeking temporary labor certification and not the nature of the duties to be performed. Thus, if an employer finds itself in need of labor for a temporary period of time (less than one year), it is irrelevant that the employer performs the particular duties on an ongoing, permanent basis. Thus, the court framed the issue before it as follows: "Can Artee [Corp.] establish that they have not employed machinists in the past and will not need the services of machinists in the near, definable future?" (**Id.** at 367) The court answered this inquiry in the negative, based on the fact that Artee permanently employed these workers and only hired them out temporarily to other firms. Thus, while Artee's *clients* were in temporary need of such help, Artee *itself* had a permanent and ongoing need to maintain a pool of such qualified labor in order to stay in business.

The case of **Sussex Engineering** involved alien automotive design engineers who were permanent employees of Sussex, hired to work temporarily in the United States for General Motors

at a time when there were not enough qualified American engineers to fill these jobs. Sussex was in the business of providing such temporary workers and maintained a permanent pool of qualified labor to perform these one-year contracts with American auto companies. The Court, in affirming the DOL's denial of temporary labor certification for these contracts, followed the rule of **Artee** and held that since Sussex's need for design engineers was not temporary and the fact that it had a permanent cadre of such employees whom it regularly hired out, and therefore not qualified for temporary labor certification under 20 C.F.R. § 655.

The facts of the case **sub judice** clearly distinguish it from **Artee** and **Sussex Engineering.** First, E & V is not in the business of providing temporary labor to egg-producing firms, a fact credibly testified to by Emilio Duran and undisputed by DOL. Rather, the three firms who entered into ten-month contracts with E & V found themselves temporarily in need of such services based on the expansion of their facilities, which are not yet ready for housing chicks. Thus, while E & V is providing its services to three such firms on a temporary basis, it also has a temporary need for these workers as its permanent workforce is utilized on its permanent, ongoing contracts with Southwest Eggs Sales, Midwest Hatchery and Farmegg. The alien employees sought by E & V will not be hired out to these firms as in **Artee** and **Sussex Engineering,** but will remain employees of E & V for the life of the contracts. Finally, E & V does not have a permanent, ongoing need for these workers, like the employers in **Artee** and **Sussex**, as the contracts for which they would be hired expire in ten months, with no foreseeable need for their labor in their future.

Furthermore, E & V provides such services under permanent contracts, using permanent employees, and only finds itself in temporary need of more workers for the same jobs because of this short-term situation involving the construction of laying houses at their clients' facilities. Thus, were we to frame the question posed by the **Artee** court, it would read as follows: "Can E & V establish that it has not employed such poultry workers in the past and will not need the services of such poultry workers in the near, definable future?" the answer is "no."

While E & V maintains a permanent cadre of poultry farmworkers to fulfill its permanent contracts, it has not hired temporary poultry workers in the past nor does it foresee a need for such temporary help in the future. Moreover, Mr. Duran testified to the fact that he anticipates fulfillment of these contracts in less than the ten months stated therein, further bolstering the temporariness of E & V's need for extra poultry workers for a fixed, short-term period. I also pause to note that on cross-examination, Mr. Moritz conceded that he did not consider the contracts with Daybreak Foods, Centerfresh, and Fremont Farms, stating "I did not review those in any detail" (TR 121), explaining that the decision to deny the application was based on information provided to him by other staff members in his office who are more familiar with this area of law, however, these communications were not memorialized in writing. (TR 118) When asked whether, given the nature of these contracts, he would now grant this application, he remained equivocal:

> "If I had all the information that was discussed and so forth, and really sort it out in my mind, my answer is that we would certainly give consideration to considering it as possibly being temporary. I won't say right now, but, yes, that is temporary."

(TR 125, lines 15-20) When asked whether, based on the facts testified to by Mr. Duran at the hearing, he would approve the application, he again hedged, stating "if it is temporary then, yes, [we] would deal with it, we'd have to certify it based on the facts that are presented." (TR 145)

Finally, it is of considerable import that the **Artee** court recognized that there may be situations where even a temporary labor agency may be eligible to apply for temporary labor certification:

> "The business of a temporary help service is to meet the temporary needs of its clients. To do this they must have a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand. By the very nature of this arrangement, it is obvious that a temporary help service will maintain on its payroll, more or less continuously, the types of skilled employee most in demand. *This does not mean that a temporary help service can never offer employment of a temporary nature. If there is no demand for a particular type of skill, the temporary help service does not have a continuing and permanent need.* ***Thus a temporary help service may be able to demonstrate that in addition to its regularly employed workers and permanent staff needs it also hires workers for temporary positions."***

Artee, supra, at 367-368. (Emphasis added)

A worker is employed on a temporary basis where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely, is not temporary. 29 C.F.R. § 500.20(s)(2). Further, the regulations governing H-2A applications indicate that the term "temporary," as used above, refers to any job opportunity covered by this subpart where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year. 20 C.F.R. § 655.100(c)(2)(iii). According to the regulatory and rule-making history, an employer seeking the benefits of H-2 visas for non-immigrant aliens must establish that it has a temporary need for these workers, not that the job is temporary. **See** 52 Fed. Reg. 16,770 (1987)(proposed May 5, 1987); 52 Fed. Reg. 20,496 (1987)(interim final rule June 1, 1987); 52 Fed. Reg. 20,507 (1987)(codified at 20 C.F.R. Part 655). **See also W. A. Maltsberger,** 1998-TLC-6 (Feb. 20, 1998). Specifically, the rule-making process demonstrates that the Department of Labor accepted the interpretation as held in **Matter of Artee Corp.,** 18 I & N Dec 366 (1982), 1982 WL 190706 (BIA Nov. 24, 1982), which held that what is relevant in determining whether an employer has made a bona fide H-2 application is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. **Id.;** 52 Fed. Reg. 20,497 - 20,298 (1987)(interim final rule June 1, 1987).

Respondent has established such a temporary need as that term is defined and interpreted by the INS. E & V finds itself temporarily in need of extra workers for the completion of three ten-month contracts entered into with egg-producers who are expanding their facilities and must use outside help to house their pullets for this period of time until construction is completed. Thus, while it is true that part of the temporary need in this case is that if E & V's clients, it is also a

temporary need on the part of E & V because they cannot use their permanent workers for these jobs and cannot find U.S. workers interested in this work given both its temporariness and the physically-demanding and undesirable nature of the work to be performed. The regulations themselves acknowledge the difficulty encountered by employers seeking employees for these types of jobs and 20 C.F.R. § 655.93(c) provides for special handling of these applications. **See also In the Matter of W. A. Maltsberger,** 98-TLC-6 (ALJ Feb. 20, 1998) ("The regulations anticipate that there will be no U.S. workers these positions, however, the regulations still require that the applications be for less than one year.") **Id.** at n.7. Finally, Emilio Duran, as sole proprietor of E & V, should not be discouraged in his entrepreneurial efforts and should not be required to turn down such business merely because it requires him to hire extra temporary labor. That is the very purpose for which the H-2A program was extended in 1984 and to deny Respondent's application in this case would contradict the spirit and purpose of that program.

CONCLUSION

Based on the foregoing discussion, I find and conclude that Respondent has established a temporary need for poultry workers within the meaning of 20 C.F.R. § 655.100(c)(2)(iii) and 29 C.F.R. § 500.20(s)(2).

ORDER

The Certifying Officer's denial of temporary alien agricultural labor certification is hereby **REVERSED** and the Certifying Officer shall immediately approve certification of the 48 temporary alien poultry farmworkers requested by E & V Contract Farms.

DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:km